FIRST DIVISION

[G.R. No. 138334. August 25, 2003]

ESTELA L. CRISOSTOMO, *petitioner*, vs. THE COURT OF APPEALS and CARAVAN TRAVEL & TOURS INTERNATIONAL, INC., *respondents*.

D E C I S I O N

YNARES-SANTIAGO, *J.*:

In May 1991, petitioner Estela L. Crisostomo contracted the services of respondent Caravan Travel and Tours International, Inc. to arrange and facilitate her booking, ticketing and accommodation in a tour dubbed Jewels of Europe. The package tour included the countries of England, Holland, Germany, Austria, Liechstenstein, Switzerland and France at a total cost of P74,322.70. Petitioner was given a 5% discount on the amount, which included airfare, and the booking fee was also waived because petitioners niece, Meriam Menor, was respondent companys ticketing manager.

Pursuant to said contract, Menor went to her aunts residence on June 12, 1991 a Wednesday to deliver petitioners travel documents and plane tickets. Petitioner, in turn, gave Menor the full payment for the package tour. Menor then told her to be at the Ninoy Aquino International Airport (NAIA) on **Saturday**, two hours before her flight on board British Airways.

Without checking her travel documents, petitioner went to NAIA on Saturday, June 15, 1991, to take the flight for the first leg of her journey from Manila to Hongkong. To petitioners dismay, she discovered that the flight she was supposed to take had already departed the previous day. She learned that her plane ticket was for the flight scheduled on June 14, 1991. She thus called up Menor to complain.

Subsequently, Menor prevailed upon petitioner to take another tour the British Pageant which included England, Scotland and Wales in its itinerary. For this tour package, petitioner was asked anew to pay US$785.00 or P20,881.00 (at the then prevailing exchange rate of P26.60). She gave respondent US$300 or P7,980.00 as partial payment and commenced the trip in July 1991.

Upon petitioners return from Europe, she demanded from respondent the reimbursement of P61,421.70, representing the difference between the sum she paid for Jewels of Europe and the amount she owed respondent for the British Pageant tour. Despite several demands, respondent company refused to reimburse the amount, contending that the same was non-refundable.[1] Petitioner was thus constrained to file a complaint against respondent for breach of contract of carriage and damages, which was docketed as Civil Case No. 92-133 and raffled to Branch 59 of the Regional Trial Court of Makati City.

In her complaint,[2] petitioner alleged that her failure to join Jewels of Europe was due to respondents fault since it did not clearly indicate the departure date on the plane ticket. Respondent was also negligent in informing her of the wrong flight schedule through its employee Menor. She insisted that the British Pageant was merely a substitute for the Jewels of Europe tour, such that the cost of the former should be properly set-off against the sum paid for the latter.

For its part, respondent company, through its Operations Manager, Concepcion Chipeco, denied responsibility for petitioners failure to join the first tour. Chipeco insisted that petitioner was informed of the correct departure date, which was clearly and legibly printed on the plane ticket. The travel documents were given to petitioner two days ahead of the scheduled trip. Petitioner had only herself

to blame for missing the flight, as she did not bother to read or confirm her flight schedule as printed on the ticket.

Respondent explained that it can no longer reimburse the amount paid for Jewels of Europe, considering that the same had already been remitted to its principal in Singapore, Lotus Travel Ltd., which had already billed the same even if petitioner did not join the tour. Lotus European tour organizer, Insight International Tours Ltd., determines the cost of a package tour based on a minimum number of projected participants. For this reason, it is accepted industry practice to disallow refund for individuals who failed to take a booked tour.[3]

Lastly, respondent maintained that the British Pageant was not a substitute for the package tour that petitioner missed. This tour was independently procured by petitioner after realizing that she made a mistake in missing her flight for Jewels of Europe. Petitioner was allowed to make a partial payment of only US$300.00 for the second tour because her niece was then an employee of the travel agency. Consequently, respondent prayed that petitioner be ordered to pay the balance of P12,901.00 for the British Pageant package tour.

After due proceedings, the trial court rendered a decision,[4] the dispositive part of which reads:

WHEREFORE, premises considered, judgment is hereby rendered as follows:

1. Ordering the defendant to return and/or refund to the plaintiff the amount of Fifty Three Thousand Nine Hundred Eighty Nine Pesos and Forty Three Centavos (P53,989.43) with legal interest thereon at the rate of twelve percent (12%) per annum starting January 16, 1992, the date when the complaint was filed;

2. Ordering the defendant to pay the plaintiff the amount of Five Thousand (P5,000.00) Pesos as and for reasonable attorneys fees;

3. Dismissing the defendants counterclaim, for lack of merit; and

4. With costs against the defendant.

SO ORDERED.[5]

The trial court held that respondent was negligent in erroneously advising petitioner of her departure date through its employee, Menor, who was not presented as witness to rebut petitioners testimony. However, petitioner should have verified the exact date and time of departure by looking at her ticket and should have simply not relied on Menors verbal representation. The trial court thus declared that petitioner was guilty of contributory negligence and accordingly, deducted 10% from the amount being claimed as refund.

Respondent appealed to the Court of Appeals, which likewise found both parties to be at fault. However, the appellate court held that petitioner is more negligent than respondent because as a lawyer and well-traveled person, she should have known better than to simply rely on what was told to her. This being so, she is not entitled to any form of damages. Petitioner also forfeited her right to the Jewels of Europe tour and must therefore pay respondent the balance of the price for the British Pageant tour. The dispositive portion of the judgment appealed from reads as follows:

WHEREFORE, premises considered, the decision of the Regional Trial Court dated October 26, 1995 is hereby REVERSED and SET ASIDE. A new judgment is hereby ENTERED requiring the plaintiff-appellee to pay to the defendant-appellant the amount of P12,901.00, representing the balance of the price of the British Pageant Package Tour, the same to earn legal interest at the rate of SIX PERCENT (6%) per annum, to be computed from the time the counterclaim was filed until the finality of this decision. After this decision becomes final and executory, the rate of TWELVE PERCENT (12%) interest per annum shall be additionally imposed on the total

obligation until payment thereof is satisfied. The award of attorneys fees is DELETED. Costs against the plaintiff-appellee.

SO ORDERED.[6]

Upon denial of her motion for reconsideration,[7] petitioner filed the instant petition under Rule 45 on the following grounds:

I

It is respectfully submitted that the Honorable Court of Appeals committed a reversible error in reversing and setting aside the decision of the trial court by ruling that the petitioner is not entitled to a refund of the cost of unavailed Jewels of Europe tour she being equally, if not more, negligent than the private respondent, for in the contract of carriage the common carrier is obliged to observe utmost care and extra-ordinary diligence which is higher in degree than the ordinary diligence required of the passenger. Thus, even if the petitioner and private respondent were both negligent, the petitioner cannot be considered to be equally, or worse, more guilty than the private respondent. At best, petitioners negligence is only contributory while the private respondent [is guilty] of gross negligence making the principle of pari delicto inapplicable in the case;

II

The Honorable Court of Appeals also erred in not ruling that the Jewels of Europe tour was not indivisible and the amount paid therefor refundable;

III

The Honorable Court erred in not granting to the petitioner the consequential damages due her as a result of breach of contract of carriage.[8]

Petitioner contends that respondent did not observe the standard of care required of a common carrier when it informed her wrongly of the flight schedule. She could not be deemed more negligent than respondent since the latter is required by law to exercise extraordinary diligence in the fulfillment of its obligation. If she were negligent at all, the same is merely contributory and not the proximate cause of the damage she suffered. Her loss could only be attributed to respondent as it was the direct consequence of its employees gross negligence.

Petitioners contention has no merit.

By definition, a contract of carriage or transportation is one whereby a certain person or association of persons obligate themselves to transport persons, things, or news from one place to another for a fixed price.[9] Such person or association of persons are regarded as carriers and are classified as private or special carriers and common or public carriers.[10] A common carrier is defined under Article 1732 of the Civil Code as persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water or air, for compensation, offering their services to the public.

It is obvious from the above definition that respondent is not an entity engaged in the business of transporting either passengers or goods and is therefore, neither a private nor a common carrier. Respondent did not undertake to transport petitioner from one place to another since its covenant with its customers is simply to make travel arrangements in their behalf. Respondents services as a travel agency include procuring tickets and facilitating travel permits or visas as well as booking customers for tours.

While petitioner concededly bought her plane ticket through the efforts of respondent company, this does not mean that the latter *ipso facto* is a common carrier. At most, respondent acted merely as an agent of the airline, with whom petitioner ultimately contracted for her carriage to Europe. Respondents obligation to petitioner in this regard was simply to see to it that petitioner was properly

booked with the airline for the appointed date and time. Her transport to the place of destination, meanwhile, pertained directly to the airline.

The object of petitioners contractual relation with respondent is the latters service of **arranging and facilitating** petitioners booking, ticketing and accommodation in the package tour. In contrast, the object of a contract of carriage is the **transportation** of passengers or goods. It is in this sense that the contract between the parties in this case was an ordinary one for services and not one of carriage. Petitioners submission is premised on a wrong assumption.

The nature of the contractual relation between petitioner and respondent is determinative of the degree of care required in the performance of the latters obligation under the contract. For reasons of public policy, a common carrier in a contract of carriage is bound by law to carry passengers as far as human care and foresight can provide using the utmost diligence of very cautious persons and with due regard for all the circumstances.[11] As earlier stated, however, respondent is not a common carrier but a travel agency. It is thus not bound under the law to observe extraordinary diligence in the performance of its obligation, as petitioner claims.

Since the contract between the parties is an ordinary one for services, the standard of care required of respondent is that of a good father of a family under Article 1173 of the Civil Code.[12] This connotes reasonable care consistent with that which an ordinarily prudent person would have observed when confronted with a similar situation. The test to determine whether negligence attended the performance of an obligation is: did the defendant in doing the alleged negligent act use that reasonable care and caution which an ordinarily prudent person would have used in the same situation? If not, then he is guilty of negligence.[13]

In the case at bar, the lower court found Menor negligent when she allegedly informed petitioner of the wrong day of departure. Petitioners testimony was accepted as indubitable evidence of Menors alleged negligent act since respondent did not call Menor to the witness stand to refute the allegation. The lower court applied the presumption under Rule 131, Section 3 (e)[14] of the Rules of Court that evidence willfully suppressed would be adverse if produced and thus considered petitioners uncontradicted testimony to be sufficient proof of her claim.

On the other hand, respondent has consistently denied that Menor was negligent and maintains that petitioners assertion is belied by the evidence on record. The date and time of departure was legibly written on the plane ticket and the travel papers were delivered two days in advance precisely so that petitioner could prepare for the trip. It performed all its obligations to enable petitioner to join the tour and exercised due diligence in its dealings with the latter.

We agree with respondent.

Respondents failure to present Menor as witness to rebut petitioners testimony could not give rise to an inference unfavorable to the former. Menor was already working in France at the time of the filing of the complaint,[15] thereby making it physically impossible for respondent to present her as a witness. Then too, even if it were possible for respondent to secure Menors testimony, the presumption under Rule 131, Section 3(e) would still not apply. The opportunity and possibility for obtaining Menors testimony belonged to both parties, considering that Menor was not just respondents employee, but also petitioners niece. It was thus error for the lower court to invoke the presumption that respondent willfully suppressed evidence under Rule 131, Section 3(e). Said presumption would logically be inoperative if the evidence is not intentionally omitted but is simply unavailable, or when the same could have been obtained by both parties.[16]

In sum, we do not agree with the finding of the lower court that Menors negligence concurred with the negligence of petitioner and resultantly caused damage to the latter. Menors negligence was not sufficiently proved, considering that the only evidence presented on this score was petitioners uncorroborated narration of the events. It is well-settled that the party alleging a fact has the burden of proving it and a mere allegation cannot take the place of evidence.[17] If the plaintiff, upon whom rests

the burden of proving his cause of action, fails to show in a satisfactory manner facts upon which he bases his claim, the defendant is under no obligation to prove his exception or defense.[18]

Contrary to petitioners claim, the evidence on record shows that respondent exercised due diligence in performing its obligations under the contract and followed standard procedure in rendering its services to petitioner. As correctly observed by the lower court, the plane ticket[19] issued to petitioner clearly reflected the departure date and time, contrary to petitioners contention. The travel documents, consisting of the tour itinerary, vouchers and instructions, were likewise delivered to petitioner two days prior to the trip. Respondent also properly booked petitioner for the tour, prepared the necessary documents and procured the plane tickets. It arranged petitioners hotel accommodation as well as food, land transfers and sightseeing excursions, in accordance with its avowed undertaking.

Therefore, it is clear that respondent performed its prestation under the contract as well as everything else that was essential to book petitioner for the tour. Had petitioner exercised due diligence in the conduct of her affairs, there would have been no reason for her to miss the flight. Needless to say, after the travel papers were delivered to petitioner, it became incumbent upon her to take ordinary care of her concerns. This undoubtedly would require that she at least read the documents in order to assure herself of the important details regarding the trip.

The negligence of the obligor in the performance of the obligation renders him liable for damages for the resulting loss suffered by the obligee. Fault or negligence of the obligor consists in his failure to exercise due care and prudence in the performance of the obligation as the nature of the obligation so demands.[20] There is no fixed standard of diligence applicable to each and every contractual obligation and each case must be determined upon its particular facts. The degree of diligence required depends on the circumstances of the specific obligation and whether one has been negligent is a question of fact that is to be determined after taking into account the particulars of each case.[21]

The lower court declared that respondents employee was negligent. This factual finding, however, is not supported by the evidence on record. While factual findings below are generally conclusive upon this court, the rule is subject to certain exceptions, as when the trial court overlooked, misunderstood, or misapplied some facts or circumstances of weight and substance which will affect the result of the case.[22]

In the case at bar, the evidence on record shows that respondent company performed its duty diligently and did not commit any contractual breach. Hence, petitioner cannot recover and must bear her own damage.

WHEREFORE, the instant petition is DENIED for lack of merit. The decision of the Court of Appeals in CA-G.R. CV No. 51932 is AFFIRMED. Accordingly, petitioner is ordered to pay respondent the amount of P12,901.00 representing the balance of the price of the British Pageant Package Tour, with legal interest thereon at the rate of 6% per annum, to be computed from the time the counterclaim was filed until the finality of this Decision. After this Decision becomes final and executory, the rate of 12% per annum shall be imposed until the obligation is fully settled, this interim period being deemed to be by then an equivalent to a forbearance of credit.[23]

SO ORDERED.

Davide, Jr., C.J., (Chairman), Vitug, Carpio, and *Azcuna, JJ.,* concur.

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[1] TSN, March 4, 1993, pp. 4-6.

[2] RTC Records, p. 1.

[3] TSN, August 30, 1994, pp. 6-9.

[4] Rollo, pp. 38-43.

[5] *Id*. at 43; penned by Judge Lucia Violago Isnani.

[6] *Id*. at 36.

[7] *Id*. at 37.

[8] *Id*. at 15.

[9] Commentaries and Jurisprudence on the Commercial Laws of the Philippines, Vol. 4 (1993 Edition), Aguedo F. Agbayani, p. 1, citing 1 Blanco 640.

[10] *Id*. at 4.

[11] Civil Code of the Philippines, Article 1755.

[12] Article 1173. The fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place. When negligence shows bad faith, the provisions of Articles 1171 and 2201, paragraph 2, shall apply.

If the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required.

[13] Jarco Marketing Corporation v. Court of Appeals, 378 Phil. 991, 1003 (1999), citing Picart v. Smith, 37 Phil. 809 (1918).

[14] This rule states:

SEC. 3. Disputable presumptions. The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

x x x x x x x x x

(e) That evidence willfully suppressed would be adverse if produced;

x x x x x x x x x

[15] *Supra*, note 3 at 10.

[16] The Revised Rules of Court in the Philippines, Vol. VII, Part II (1999 Edition) V. Francisco, p. 92.

[17] Pimentel v. Court of Appeals, 307 SCRA 38.

[18] Castilex Industrial Corporation v. Vasquez, Jr., 378 Phil. 1009, 1018 (1999), citing Belen v. Belen, 13 Phil. 202, 206 (1909), cited in Martin v. Court of Appeals, G.R. No. 82248, 205 SCRA 591 (1992).

[19] *Supra*, note 2 at 60 & 94.

[20] Bayne Adjusters and Surveyors, Inc. v. Court of Appeals, G.R. No. 116332, 323 SCRA 231 (2000), citing Articles 1170, 1172-73, Civil Code; Southeastern College, Inc. v. Court of Appeals, 354 Phil 434 (1998).

[21] Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. IV (1999 Edition), Arturo M. Tolentino, p. 124.

[22] *Supra*, note 13, citing Borillo v. CA, G.R. No. 55691, 209 SCRA 130 (1992); Mckee v. Intermediate Appellate Court, G.R. No. 68102, 211 SCRA 517 (1992); and Salvador v. Court of Appeals, 313 Phil. 36 (1995).

[23] Eastern Shipping Lines, Inc. v. Court of Appeals, G.R. No. 97412, 12 July 1994, 234 SCRA 78, 97.